No. 98-1167

In the Supreme Court of the United States

EDWARD CHRISTENSEN, ET AL., PETITIONERS

v.

HARRIS COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 207(*o*), may, absent a preexisting agreement, require its employees to use accrued compensatory time.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay their employees a minimum wage and to compensate overtime work at a rate of one and one-half times the employees' regular rate of pay. 29 U.S.C. 206, 207. Public agencies, including federal agencies and state and local governments, are subject to the FLSA. 29 U.S.C. 203(d), (s)(1)(C) and (x). This Court has held that application of the FLSA's minimum wage and overtime provisions to state and local governments

is a valid exercise of Congress's power to regulate interstate commerce. See *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which in turn had overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968)).[1]

In 1985, in response to *Garcia*, Congress amended the FLSA to provide state and local governments a temporary period of relief from liability and to address certain other public agency concerns. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787-791. One of the 1985 amendments (codified at 29 U.S.C. 207(*o*)) permits employees of state and local governments to receive, "in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required." 29 U.S.C. 207(*o*)(1). A public agency may provide compensatory time "only—

> (A) pursuant to —
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and
>
> (B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

29 U.S.C. 207(*o*)(2).[2] The applicable limit is 480 hours of compensatory time for "work in a public safety activity, an emergency response activity, or a seasonal activity," and 240 hours for any other work. 29 U.S.C. 207(*o*)(3)(A). An employee who reaches the applicable limit "shall, for additional overtime hours of work, be paid overtime compensation." *Ibid.*

For all employees, payment for accrued compensatory time off must be "at the regular rate earned by the employee at the time the employee receives such payment." 29 U.S.C. 207(*o*)(3)(B). An employee with accrued compensatory time also has a right to be paid for it at specified rates on termination of employment. 29 U.S.C. 207(*o*)(4). An employee who requests to use accrued compensatory time "shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. 207(*o*)(5).

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[1] In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that Congress lacks the power under Article I of the Constitution to abrogate a State's sovereign immunity from suit in federal court. In *Alden* v. *Maine*, 119 S. Ct. 2240 (1999), the Court held that sovereign immunity also protects a State from FLSA suits for money damages by private parties in state courts. State sovereign immunity, however, "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 119 S. Ct. at 2267. Respondent Harris County has not argued that it is immune from suit in this case.

[2] For employees subject to Section 207(*o*)(2)(A)(ii) who were hired before April 15, 1986, "the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding." 29 U.S.C. 207(*o*)(2).

2. The 1985 amendments direct the Secretary of Labor to "promulgate such regulations as may be required to implement [the] amendments." Section 6, 99 Stat. 790 (29 U.S.C. 203 note). Pursuant to that directive, the Department of Labor promulgated 29 C.F.R. Pt. 553. Among other things, those regulations provide that an agreement or understanding regarding payment of compensatory time may include "provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section [207(*o*)]." 29 C.F.R. 553.23(a)(2). Inconsistent provisions are "superseded" by the statute. *Ibid.*

When employees do not have a recognized representative, a state or local government's agreement or understanding with an individual employee may "take the form of an express condition of employment," provided that the employee knowingly and voluntarily agrees to the condition and is informed "that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section [207(*o*)]." 29 C.F.R. 553.23(c)(1).[3]

3. In *Moreau* v. *Klevenhagen*, 508 U.S. 22, 35 (1993), this Court held that respondent Harris County is governed by 29 U.S.C. 207(*o*)(2)(A)(ii), the provision requiring agreements or understandings with individual employees, rather than 29 U.S.C. 207(*o*)(2)(A)(i), the provision requiring an agreement with the employees' representative. The County has reached agreements that provide for the granting of compensatory time off to its employees. Pet. App. 29a-31a; *Moreau*, 508 U.S.

[3] For employees hired before April 15, 1986, the "regular practice" that the statute permits to serve as an agreement must also conform to the provisions of Section 207(*o*). 29 C.F.R. 553.23(c)(2).

at 29. The County's Sheriff's Department has a policy under which each employee's accrued compensatory time is kept below a level determined by each bureau commander. Pet. App. 29a. When an employee appears to have accumulated hours approaching the maximum allowed by the FLSA, the employee is asked to take steps voluntarily to reduce his or her accumulated hours. *Id.* at 30a. If the employee does not do so, the employee's supervisor may order him or her to do so. *Ibid.* The Sheriff's Department attempts to arrange a mutually agreeable time for the employee to use the hours, but if an agreement cannot be reached, the supervisor may order the employee to use the hours at a time that will best serve the personnel requirements of the bureau. *Ibid.* An employee dissatisfied with the supervisor's order may complain on an informal basis to a supervisor at a higher level in the Department. *Ibid.*; see also *id.* at 4a, 25a.

4. a. Petitioners are deputy sheriffs who have not yet accumulated 240 hours of compensatory time, the lower limit permitted by 29 U.S.C. 207(*o*)(3)(A). Pet. 4; Pet. App. 25a. In April 1994, they brought a class action against respondents Harris County and its sheriff, alleging that respondents violated Section 207(*o*) of the FLSA by refusing to allow petitioners to use their accumulated compensatory time when they requested it, forcing them to use it when they did not request it, and retaliating against them. Pet. 4-5; see Pet. App. 3a. The parties stipulated to the facts, discussed above, concerning the County's policy. Pet. App. 4a, 29a-31a.

b. In November 1996, the district court granted summary judgment to petitioners. Pet. App. 24a-27a. Following *Heaton* v. *Moore*, 43 F.3d 1176 (8th Cir. 1994), cert. denied, 515 U.S. 1104 (1995), the court concluded that, under Section 207(*o*), compensatory

"time off must be consumable by the worker on the worker's terms." Pet. App. 25a. The court reasoned that a public employer may control an employee's use of compensatory time only when an employee's requested use of that time would disrupt the employer's operations, and it found no suggestion in this case of any disruption of the County's operations. *Id.* at 26a-27a.

In July 1997, the district court entered what it termed its "Final Judgment." Pet. App. 28a. That judgment stated that the County "may not force employees to use their accumulated compensatory time without violating the Fair Labor Standards Act," and it awarded attorney's fees to petitioners. *Ibid.* Petitioners did not ask the district court to rule on their claims based on the County's alleged refusal of permission to use compensatory time when requested and its alleged retaliation, and the court did not do so. *Id.* at 5a.

5. a. The court of appeals reversed. Pet. App. 1a-23a. The court first concluded that it had jurisdiction because the district court had decided all claims that petitioners had not abandoned. *Id.* at 5a-6a.[4] Turning to the merits, the court held that the County could

[4] The parties have not questioned the court of appeals' conclusion that petitioners abandoned the claims on which the district court did not rule. See also Br. in Opp. 2 (endorsing that conclusion). The ruling of the court of appeals that it had jurisdiction if the district court intended its judgment to dispose of all remaining claims is consistent with the views of other courts of appeals. See, *e.g.*, *Baltimore Orioles, Inc.* v. *Major League Baseball Players Ass'n*, 805 F.2d 663, 666-667 (7th Cir. 1986), cert. denied, 480 U.S. 941 (1987); *General Time Corp.* v. *Padua Alarm Sys., Inc.*, 199 F.2d 351, 358 (2d Cir. 1952), cert. denied, 345 U.S. 917 (1953); 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.7, at 547 & n.14 (2d ed. 1992).

require its employees to use their compensatory time sooner than they preferred. *Id.* at 6a-13a.

The court rejected petitioners' argument that the FLSA confers on employees an unrestricted right to use accumulated compensatory time, subject only to the limitation in 29 U.S.C. 207(*o*)(5) that the use of such time not unduly disrupt the operations of the public agency. Pet. App. 8a. That provision is inapplicable, the court reasoned, because it is triggered only when an employee first requests to use compensatory time. *Id.* at 8a-9a. The court also reasoned that 29 U.S.C. 207(*o*)(3)(B), which recognizes a public employer's ability to pay down accrued compensatory time, reflects a "Congressional intent to permit public employers to control the accrual of comp time." Pet. App. 9a. Against this background, the court concluded that Congress did not consider the question whether an employer could require employees to use compensatory time. *Id.* at 10a. Because the court found it impossible to determine how Congress would have legislated on that question, the Court decided to "devis[e] [its] own solution." *Ibid.*

The solution devised by the court of appeals was that, absent an agreement to the contrary, an employer may require its employees to use accrued compensatory time against their will. See Pet. App. 10a-13a. The court believed that its "default rule" was appropriate because it reflected "the general principle that the employer can set workplace rules in the absence of a negotiated agreement to the contrary." *Id.* at 13a.

The court of appeals recognized that the Eighth Circuit in *Heaton* had reached a different conclusion, but it rejected *Heaton*'s reasoning as "flawed." Pet. App. 10a. The court observed that it could nevertheless follow *Heaton* on prudential grounds, or to avoid an

intercircuit conflict. *Id.* at 11a. The court chose not to do so, however, because it believed *Heaton* was in tension with the Fifth Circuit's own prior decision in *Local 889, AFSCME* v. *Louisiana*, 145 F.3d 280 (1998), which held that a public employer may require employees to use compensatory time before using accrued leave.[5] Pet. App. 11a. The court did not consider the lack of uniformity with *Heaton* to be "a substantial concern" because state and local governments and their employees could contract for a different result under 29 C.F.R. 553.23(a), which permits agreements concerning compensatory time so long as they do not contradict the FLSA. Pet. App. 11a-12a. Because the parties in this case had not identified any such agreement, the court applied the "background rule" that it believed it had an "obligation" "to fashion." *Id.* at 12a. Applying that rule, the court entered judgment for respondents. *Id.* at 14a.

b. Judge Dennis dissented. Pet. App. 14a-23a. He agreed with the majority that the statute does not answer the question presented, but concluded that the Department of Labor's regulations do and are entitled to deference. *Id.* at 14a-19a. In the dissent's view, the regulations do not give control over the use of accrued compensatory time to either the employee or the employer but instead allow the parties to reach an agreement on the preservation, use, or cashing out of compensatory time, so long as any such agreement is

[5] *Local 889* reasoned, contrary to *Heaton*, that 29 U.S.C. 207(*o*) creates no right in accrued compensatory time. See Pet. App. 10a; *Local 889*, 145 F.3d at 285. *Local 889* distinguished *Heaton*, however, on the ground that the State in *Local 889*, unlike the employer in *Heaton*, did not force employees to take time off, but rather only required the use of compensatory time once an employee had requested leave. See *Local 889*, 145 F.3d at 285.

consistent with Section 207(*o*). *Id.* at 18a. Absent an agreement, Judge Dennis concluded, an employer may not require an employee involuntarily to use accrued compensatory time. *Ibid.*

Judge Dennis observed that agreements between respondent Harris County and individual employees providing for compensatory time in lieu of monetary overtime apparently exist, Pet. App. 20a (citing *Moreau*, 508 U.S. at 29), and he would have taken judicial notice of their apparent existence. *Ibid.* Because the agreements are not in the record, however, he would have remanded to allow the district court to consider whether the agreements contain provisions that permit respondents to require petitioners to use accrued compensatory time, and, if so, whether those provisions are consistent with Section 207(*o*). *Ibid.*

DISCUSSION

The petition for a writ of certiorari should be granted. The decision of the court of appeals is incorrect. This Court's review is warranted because the decision conflicts with *Heaton* v. *Moore*, 43 F.3d 1176 (8th Cir. 1994), cert. denied, 515 U.S. 1104 (1995), and the question presented is an important one.

1. Although the court of appeals correctly observed that 29 U.S.C. 207(*o*) does not explicitly address whether a public employer may force its employees to use accrued compensatory time (Pet. App. 10a), the court erred in concluding that it could therefore "fashion" its own "background" or "default" rule (*id.* at 12a) without regard to the text and purpose of Section 207(*o*) and the Secretary of Labor's implementing regulations and interpretative guidance. Those guideposts for statutory interpretation establish that a public employer may not direct its employees to use accrued

compensatory time absent an agreement that authorizes it to do so.[6]

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[6] This case does not present the question whether a public employer and its employees may agree to give the employer some control over when the employees use their compensatory time, a question on which there is no conflict among the courts of appeals. The Department of Labor has taken the position that such agreements are permissible provided they are consistent with Section 207(*o*). See 29 C.F.R. 553.23(a)(2) (agreements may include provisions governing the "preservation, use, or cashing out" of compensatory time so long as they are consistent with Section 207(*o*)); 6A Wage & Hour Man. (BNA) 99:5212, 99:5213-99:5214 (July 29, 1988); Opinion letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100; Opinion letter from Wage & Hour Div., Dep't of Labor (Apr. 4, 1994), *available in* 1994 WL 1004765; but see Br. of Sec'y of Labor as Amicus Curiae at 13 n. 7, *Local 889, AFSCME* v. *Louisiana*, 145 F.3d 280 (5th Cir. 1998) (although the issue was not presented, expressing the view that such agreements would not be lawful, albeit without mentioning the contrary position taken by the Secretary in the regulation and opinion letters cited above).

Agreements inconsistent with Section 207(*o*) would violate the well-established principle that FLSA rights may not be waived. See, *e.g.*, *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981). An agreement to cede control over the use of compensatory time would be consistent with Section 207(*o*) if the agreement promoted the employer's flexibility to offer compensatory time in lieu of overtime pay (*e.g.*, by requiring an employee to use accrued compensatory time as he or she approached the statutory maximum), and, at the same time, preserved for the employee a sufficiently broad range of choices for using compensatory time that it retained its essential attributes as a form of compensation that substitutes for overtime pay. See 29 C.F.R. 553.20 (Section 207(*o*) "provides an element of flexibility to state and local government employers and an element of choice to their employees * * * regarding compensation for statutory overtime hours."); p. 11, *infra* (discussing function of compensatory time as a substitute for wages); p. 15, *infra* (explaining congressional intent

Section 207(*o*) is "an exception to the general FLSA rule mandating overtime pay for overtime work"—an exception under which a public employer and its employees may agree that the employees will receive compensatory time off "in lieu of overtime compensation," 29 U.S.C. 207(*o*)(1). See *Moreau* v. *Klevenhagen*, 508 U.S. 22, 34 n.16 (1993). As the Department of Labor has explained, an employee's accrued compensatory time therefore "belongs to the employee" and is generally under the employee's control, just as an employee's overtime wages must be paid unconditionally or "free and clear," 29 C.F.R. 531.35. See 60 Fed. Reg. 2180, 2206-2207 (1995) (discussing relationship of compensatory time to leave under the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*). Just as an employee "would have the right to spend the employee's cash overtime pay when and as the employee chose, so the employee should be allowed to spend the banked compensatory time as the employee chooses," *Heaton*, 43 F.3d at 1180, absent a lawful agreement to the contrary or undue disruption of the employer's operations, see 29 U.S.C. 207(*o*)(5); 29 C.F.R. 553.23, 553.25; note 6, *supra*.

The Department of Labor accordingly has construed Section 207(*o*) not to authorize a public employer, in the absence of an agreement, unilaterally to require an employee to use accrued compensatory time. See Opinion letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available in* 1992 WL 845100 (Absent an agreement, "neither the statute nor the regulations permit an employer to require an employee to use accrued compensatory time."); see also Br. of Sec'y of

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that compensatory time agreements promote employee "freedom and flexibility").

Labor as Amicus Curiae at 6-11, *Local 889, AFSCME* v. *Louisiana*, 145 F.3d 280 (5th Cir. 1988) (employer may not require employee to use compensatory time rather than annual leave because, absent undue burden on the employer, the employee may control use of accrued compensatory time). That interpretation of Section 207(*o*) of the FLSA is reasonable and therefore entitled to deference. See *Auer* v. *Robbins*, 519 U.S. 452, 457, 462 (1997).

The terms of Section 207(*o*) reflect the general principle that the employee controls the use of his or her accrued compensatory time, absent an agreement to the contrary. Section 207(*o*) identifies only one circumstance in which an employer may unilaterally control an employee's use of accrued compensatory time—when the employee has requested use of accrued time and that use would "unduly disrupt" the employer's operations. 29 U.S.C. 207(*o*)(5). If Congress had intended that the employer could impose other limitations on the use of compensatory time, it presumably would have so provided. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Here, however, the court of appeals held that an employer not only may narrow the range of circumstances in which an employee may use accrued compensatory time, but also may affirmatively require the employee to use compensatory time even if the employee would prefer not to do so. Reading into Section 207(*o*) such additional employer rights unilaterally to control the preservation and use of compensatory time would be inconsistent with the function of compensatory time as substitute compensation and would impermissibly "enlarge[] by implication" the exception provided by Section 207(*o*). *Citicorp Indus. Credit, Inc.* v. *Brock*, 483 U.S. 27, 35 (1987). See *Moreau*, 508 U.S. at 33 (applying to Section

207(*o*) the "well-established rule that 'exemptions from the [FLSA] are to be narrowly construed'").[7]

Furthermore, "employers may take advantage of the benefits [that Section 207(*o*)] offers 'only' pursuant to certain conditions set forth by Congress." *Moreau*, 508 U.S. at 34 n.16 (quoting 29 U.S.C. 207(*o*)(2)). One of those conditions is that an employer may substitute compensatory time for paid overtime "only" pursuant to "an agreement or understanding arrived at between the employer and employee." 29 U.S.C. 207(*o*)(2)(A)(ii). Department of Labor regulations provide that the agreement or understanding may include "provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with [Section 207(*o*)]." 29 C.F.R. 553.23(a)(2). See also H.R. Rep. No. 331, 99th Cong., 1st Sess. 20 (1985) ("The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as those provisions are consistent with [Section 207(*o*)] and the remainder of the Act."); S. Rep. No. 159, 99th Cong., 1st Sess. 11 (1985) (same). As the Department of

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[7] As the court of appeals noted (Pet. App. 9a), 29 U.S.C. 207(*o*)(3)(B), which provides that payment for accrued compensatory time must be "at the regular rate earned by the employee at the time the employee receives such payment," rests on the assumption that an employer may pay down accrued compensatory time. See 29 C.F.R. 553.27(a). That provision does not, however, as the court of appeals mistakenly believed (Pet. App. 9a), "reflect[] Congressional intent to permit public employers to control the accrual of comp time" as a general matter. Rather, it establishes only that employers may do what the FLSA requires them to do apart from Section 207(*o*)—pay for overtime work at one and one-half times the employee's regular rate of pay. There is no suggestion in Section 207(*o*) that an employer may reduce accrued time without paying for it.

Labor explained in its September 14, 1992, Opinion letter (see p. 11, *supra*), an employer's unilateral imposition of conditions on the use of compensatory time would be inconsistent with the statutory requirement that compensatory time be provided "only" pursuant to an "agreement or understanding," terms that require a meeting of minds or mutual assent, see *Black's Law Dictionary* 62, 1369 (5th ed. 1979).[8]

Allowing an employer to force employees to use accrued compensatory time without an agreement on that issue would also undermine the requirement that an agreement or understanding concerning compensatory time be reached "before the performance of the work." 29 U.S.C. 207(*o*)(2)(A)(ii). An employer who could unilaterally impose or alter the conditions under which employees may use accrued compensatory time would have little incentive to agree to terms concerning its preservation or use before work is performed. Instead, the employer's incentive would be to wait until an employee had already performed the work and accepted compensatory time instead of overtime pay and then to impose conditions that might be objectionable to the employee.[9]

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[8] The statutory requirement that compensatory time be granted only pursuant to an agreement supersedes the background principle that an employer may generally set workplace rules, the primary ground on which the court of appeals relied to justify its default rule, see Pet. App. 13a.

[9] Allowing employers unilaterally to require employees to use accrued compensatory time would also be in tension with the second major condition that Congress imposed on an employer's invocation of Section 207(*o*): An employer may provide compensatory time rather than overtime pay "only * * * if the employee has not accrued compensatory time in excess of the [statutory] limit." 29 U.S.C. 207(*o*)(2)(B). An employee who has accrued compensatory time off equal to the statutory maximum "shall, for additional overtime hours of work, be paid overtime compensation." 29 U.S.C. 207(*o*)(3)(A). That requirement would have little force if employers could prevent employees from reaching the maximum by unilaterally requiring them to use their accrued time.

Finally, reading Section 207(*o*) to allow employers unilaterally to direct their employees when to use compensatory time would eliminate much of the "freedom and flexibility enjoyed by public employees" (as well as by their employers) that Congress intended to preserve in the 1985 amendments by authorizing compensatory time arrangements. See H.R. Rep. No. 331, *supra*, at 19-20. See also *Fair Labor Standards Amendments of 1985: Hearings on S. 1570 Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources*, 99th Cong., 1st Sess. 17, 96, 109-110, 275, 311, 321, 374-375, 492-493, 520, 573 (1985); *Hearing on the Fair Labor Standards Act Before the Subcomm. on Labor Standards of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 4, 71, 160, 205, 224-225 (1985) (describing how compensatory time arrangements allow employees to take extended vacations, get away from job stresses when necessary, and deal with family or personal matters). By allowing employers to direct the use of accrued compensatory time, the decision of the court of appeals could prevent employees, without their consent, from accruing amounts of compensatory time sufficient for such purposes as an extended vacation, serious surgery, or caring for young children or elderly parents.[10]

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[10] Respondents suggest (Br. in Opp. 5-6, 9) that the practice at issue here is lawful because, by forcing an employee to use his or her compensatory time, the County is, in essence, simply shortening the employee's work week and cashing out the employee's accrued compensatory time. The unilateral combination of work-

2. This Court's review is warranted to resolve a conflict between, on the one hand, the decision of the court of appeals in this case and a recent decision of the Ninth Circuit to the same effect, *Collins* v. *Lobdell*, No. 98-35655, 1999 WL 639131 (Aug. 24, 1999), and, on the other hand, the Eighth Circuit's decision in *Heaton*. In *Heaton*, the Eighth Circuit held that a public employer may not unilaterally control an employee's use of accrued compensatory time unless an employee's requested use of compensatory time would unduly

week shortening and compensatory-time cash-out described by respondents is not permitted by the FLSA, however, because it is a manipulation of work schedules designed to circumvent the requirement in Section 207(*o*) that compensatory time be governed by a preexisting agreement. This Court has held that attempts to evade the FLSA's overtime requirements by elevating form over substance are impermissible. See, *e.g.*, *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427, 430-431 (1945) (overtime pay must be based on a regular rate that takes into account incentive pay); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) (overtime pay must be based on a regular rate that takes into account payments resulting from guaranteed piece rates); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 39-41 (1944) ("split-day plan" under which daily work hours are classified as either "regular" or "overtime" in order to perpetuate the pre-statutory wage scale violates FLSA). See also 29 C.F.R. Pt. 778, Subpt. F (Pay Plans Which Circumvent the Act); 29 C.F.R. 553.224 (state or local government cannot change the length and starting time of work periods in order to evade the FLSA's overtime requirements); 6A Wage & Hour Man. (BNA) 99:5254 (Feb. 15, 1991) (although employer may use compensatory time provisions in conjunction with a time-off plan within a biweekly pay period, it may not pay a fixed salary for such fluctuating hours); H.R. Rep. No. 331, *supra*, at 22 ("The Committee expects good faith compliance by public employers and would direct the Secretary of Labor to enforce these amendments so as to prevent * * * attempts to evade Congressional intent.").

disrupt the employer's operations. 43 F.3d at 1180.[11] Here, the Fifth Circuit expressly disagreed with *Heaton*, Pet. App. 10a-11a, and held that a public employer may require employees to use accrued compensatory time unless the parties expressly agree to the contrary. *Id.* at 11a-13a; accord *Collins* v. *Lobdell*, *supra*.

Whether a public employer may force employees to use accrued compensatory time absent an agreement on the issue is an important question. As the court of appeals recognized in this case, public employers have an incentive to limit the accrual of compensatory time to avoid paying cash overtime, but their employees often want to accumulate compensatory time, either to reach the statutory maximum (at which point they would have to receive overtime pay for any overtime work) or to have the time available for later use. Pet. App. 8a. Public employers therefore may often attempt to require employees to use compensatory time without an agreement. Indeed, they have done so on a number of occasions. See Pet. App. 29a-30a; *Heaton* v. *Moore*, *supra*; *Collins* v. *Lobdell*, *supra*; *Rogers* v. *City of Virginia Beach*, No. 98-2253, 1999 WL 498707 (4th Cir. July 15, 1999); *Hellmers* v. *Town of Vestal*, 969 F. Supp. 837, 846-847 (N.D.N.Y. 1997); David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 Berkeley J. Emp. & Lab. L. 74, 111-113 (1999); cf. *Banks* v. *City of Springfield*, 959 F. Supp. 972, 979-980 (C.D. Ill. 1997)

[11] The Eighth Circuit took no position on whether the parties may agree to "limit the time and manner of the employees' use of compensatory time." 43 F.3d at 1180 n.4.

(rejecting allegation of forced use of compensatory time).[12]

Contrary to the belief of the court of appeals (Pet. App. 11a-12a), the conflict between its decision and *Heaton* is "a substantial concern" even though the court of appeals would allow an employee to obtain the employer's agreement that it will not force the employee to use compensatory time. *Ibid.* Possible agreements on compensatory time that may be entered into in the future cannot mitigate the impact of the Fifth Circuit's decision in this case and the Ninth Circuit's decision in *Collins* v. *Lobdell* on public employees who have accrued compensatory time but do not currently have agreements prohibiting forced use of that time. Employees governed by the *Heaton* rule have a remedy under the FLSA for forced-use policies that are or have been applied, but those governed by the decisions in this case and *Collins* v. *Lobdell* do not.

Moreover, employees who are subject to the decisions in this case and *Collins* v. *Lobdell* and who do not have a recognized representative have little leverage to displace the background rule fashioned by the court. They must negotiate individual agreements or under-

[12] Because the agreements on compensatory time between petitioners and respondent Harris County are not in the record, we do not know if any of those agreements specifically allows respondents to control any employee's use of compensatory time. See Pet. App. 12a. We assume that respondents would have informed the Court if any of the agreements contained such a provision. See Sup. Ct. R. 15.2. Of course, as described above, agreements giving respondents control over an employee's use of compensatory time would be permissible only if the cession of control to the employer is sufficiently circumscribed that it is consistent with Section 207(*o*). See 29 C.F.R. 553.23(a)(2); note 6, *supra*.

standings, 29 U.S.C. 207(*o*)(2)(A)(ii), and those agreements "may take the form of an express condition of employment" imposed by the employer. See 29 C.F.R. 553.23(c)(1); S. Rep. No. 159, *supra*, at 11; H.R. Rep. No. 331, *supra*, at 20. Although an employee's acceptance of such terms and conditions must be voluntary and uncoerced, 29 C.F.R. 553.23(c)(1), in practice an employee who needs a job will likely assent to what the employer is willing to offer. See also *ibid.* (the agreement or understanding "may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay"); 29 U.S.C. 207(*o*)(2) (for employees hired before April 15, 1986, "the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding"). Approximately 57% of employees subject to Section 207(*o*) do not have a recognized collective bargaining representative. See David J. Walsh, *supra*, 20 Berkeley J. Emp. & Lab. L. at 124. Thus, the Fifth Circuit's rule will likely result in large numbers of employees accepting restrictions on when and how they may use accrued compensatory time, whether they like those restrictions or not.[13]

[13] Even employees who have a collective bargaining representative (as in *Collins* v. *Lobdell*) are likely to be adversely affected by the court's rule, because they may have to make concessions to the employer on other issues subject to collective bargaining in order to obtain the employer's agreement not to require them to use compensatory time against their will.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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